Supreme Court, U.S.
FILED

10-16 JUN 28 2010

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JUBANI AGOSTIN a/k/a ZEF VOLAJ,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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June 28, 2010

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals deny the petitioner his fundamental rights to due process under the Fifth Amendment by affirming the decisions of the Board of Immigration Appeals and the Immigration Judge in an egregious departure from the accepted and usual course of judicial proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jubani Agostin, a/k/a Zef Volaj, (hereinafter, "Mr. Volaj"), asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Agostin v. Holder*, Docket No. 08-4473 (2d Cir. 2010), is attached to this petition as **Appendix A**. The agency opinion issued by the Immigration Judge is attached hereto as **Appendix C**, *In re Jubani Agostin, a/k/a Zef Volaj*, No. 099-589-904 (Immigration Judge September 29, 2006). The decision of the Board of Immigration Appeals denying Mr. Volaj's appeal of the Immigration Judge decision is attached hereto as **Exhibit B**, (BIA October 5, 2006). The decision of the Board of Immigration Appeals denying Mr. Volaj's motion to reopen is attached hereto as **Appendix E**, (BIA June 9, 2008).

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying the timely submitted petition for rehearing on March 31, 2010. The decision of the United States Court of Appeals for the Second Circuit is attached hereto as **Appendix D**. The Court of Appeals denied Mr. Volaj's timely petition for review of the decision of the Board of Immigration Appeals. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive Mr. Volaj of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the abuse of discretion standard, as a means of reviewing a motion to reopen. The Second Circuit, in applying the abuse of discretion standard to review the matter of Mr. Volaj misapplied the standard by failing to properly review the record. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Volaj's Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

Petitioner, Mr. Volaj, is a male native and citizen of Albania. He arrived in the United States on September 2, 2001. He applied for asylum, withholding of removal, and relief under the Convention Against Torture based on the persecution he suffered in Albania on account of his political opinion. Because of his opposition to Socialist government officials, Mr. Volaj was coerced at gunpoint and was threatened with death and violence by his persecutors.

Before fleeing to the United States, Mr. Volaj worked as a teacher in Albania for over thirty years. In March 1999, Mr. Volaj was employed as a schoolteacher in Grabom, Albania, in the district of Kelmend. The head of the commune, Mayor Rush Dragu, assigned Mr. Volaj the responsibility of supervising the construction work for a new school building funded by an international aid organization. Mr. Dragu belonged to the Socialist Party, but he proclaimed to be a democrat after the fall of communism in Albania. Mr. Volaj was not a member of any party, but he was affiliated with the Democratic Party and helped them by participating in "all the election meetings with deputies for the council." Mr. Volaj never formally joined the Democratic Party because he "wanted to be free and to express [his] ideas."

Eventually, Mr. Volaj discovered that the construction company engaged by the mayor was embezzling funds by using an existing structure rather than constructing a new building from the foundation. Therefore, he refused to sign off on the completed project. On March 26, 1999, after his refusal to approve the construction project, Mayor Dragu accosted him on the street and offended him in public. Mr. Volaj requested that they talk privately, and the two proceeded to Mayor Dragu's office. In the office, Dragu presented him with a copy of the project papers along with a pistol atop the signature page. He threatened Mr. Volaj, saying that "you are going to sign it or . . . you [are] not going to sign [ever] by your hand." Mr. Volaj then signed it, "frightened by the fear of death."

At the end of July 1999, Mr. Volaj sent a letter to the former Prime Minister, Pandeli Majko, regarding the corruption in the Kelmend government. The letter, in turn, was forwarded to Mayor Dragu. In the end of November 1999, Dragu responded to Mr. Volaj in a letter accusing him of slander and threatening to kill him. On November 30, 1999, Dragu sent Mr. Volaj another letter, threatening to burn him in accordance with the "Kanun" (The Code of Leke Dukagjini), a medieval Albanian code of violence usually employed in blood feuds. Although threatened by the letters, Mr. Volaj responded to Mayor Dragu, and advised him that he was keeping copies of his letters as evidence of his actions. In December 1999, Dragu told Mr. Volaj to keep his mouth closed or that it would be closed for him.

In spite of the threat, Mr. Volaj divulged Dragu's corruption before 300-400 people at an election meeting in 2000 held in the courtyard of the Kelmend "commune," in his effort to strengthen democracy in Kelmend and to put an end to the theft of funds by the Socialist government. Mayor Dragu did not win the election that year, and he returned to the Socialist Party. However, Dragu continued to "govern ... the commune without a mandate." Dragu was subsequently appointed to govern Kelmend by the Socialist Party, which positioned him as the *de facto* leader of the Kelmend government. After Mr. Volaj's public speech against Dragu, supporters of the Socialist Party were sent to threaten him.

On May 18, 2001, three policemen went to Mr. Volaj's home and told his wife that he was to report to the police station. Mr. Volaj did not comply with the order. On June 26, 2001, a man named Gezim Ukej,

a follower of Mayor Dragu, threatened to bomb Mr. Volaj's house with all of the occupants inside. Thereafter, Mr. Volaj fled with his family to Vermosh, Albania.

On July 7, 2001, in Vermosh, a man named Gjoke Noshi attempted to enter Mr. Volaj's house by force. He was unable to enter the house because Mr. Volaj's family blocked the doorway. He was carrying a firearm, visible through his unbuttoned shirt. Meanwhile, Mr. Volaj was hiding out in Broje, the village in which he was born. He knew that Noshi was an assassin. Mr. Volaj surmised that Noshi had appeared because Mr. Volaj also mentioned him in his letter to Prime Minister Majko.

In fear for his life, Mr. Volaj prepared to leave Albania at the end of August 2001. He could not relocate within Albania because the entire country was controlled by the Socialist Party. He did not report these incidents to the police because the police were also controlled by the Socialist Party. He left Albania on August 31, 2001.

On or about May 27, 2008, Mr. Volaj filed a motion to reopen removal proceedings. This motion consisted of previously unavailable documentation and exhibits material to the Volaj's contention that country conditions in Albania have deteriorated since he left, such that he has a well founded fear of being subject to further persecution if forced to return to Albania.

Specifically, the previously unavailable evidence consisted of documents showing that Mr. Volaj's brother, Ndue Volaj, was killed by poisoning in April 2007, due to his political activities. Mr. Volaj was

precluded from introducing such evidence at his trial before the IJ because the evidence was not available until in April 2007, when his brother was killed in spite of the fact that the Democratic Party was in power; offering no protection whatsoever to its members, supporters, or citizens.

Documentation submitted to the Board of Immigration Appeals, along with the motion to reopen at issue substantiated the grounds for Mr. Volaj's well founded fear of facing life threatening persecution if forced to return to Albania in view of his brother's murder and changed conditions in that country. By relying on the decision of the Board, denying Volaj's petition for review, and in failing to find that the BIA's denial of the Petitioner's motion to reopen was an abuse of discretion, the Second Circuit committed egregious error.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings.

A. The Court of Appeals for the Second Circuit arbitrarily and capriciously misapplied the abuse of discretion standard in reviewing the merits of the Volaj's application for asylum

It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. *See* Reno v. Flores, 507 U.S. 292, 307 (1993); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). At stake in asylum proceedings is the potential deprivation of a significant, constitutionally protected liberty interest, and often – more poignantly – the very life and freedom of the Petitioner. Accordingly, removal proceedings must be conducted in a manner which upholds the principles of fundamental fairness and substantial justice. *See* Bridges v. Wixon, 326 U.S. 135 (1945); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Ng Fung Ho v. White, 259 U.S. 276 (1922).

In addition, under the holding of Matthews v. Eldridge, 424 U.S. 319 (1976), to meet the standards of due process, proceedings before an administrative agency must include, amongst other fundamental guarantees, an impartial decision maker and a statement of the reasons for the decision. These elements are crucial in the context of an administrative hearing as the only protection afforded against arbitrary governmental action.

Pursuant to the holding of the United States Supreme Court in Mobil Oil Corp. v. FDC, 417 U.S. 283 (1974), the denial of the Petitioner's motion to reopen by the BIA should be vacated on the ground that it is a decision by an administrative body that was arbitrary, in contravention of the Board's own precedent, and unreasonable in the light of the evidence presented when the record is viewed as a whole. The BIA failed to properly address the previously unobtainable and material evidence Petitioner presented in support of his motion to reopen, which provided support for the proposition that he would be subject to persecution and torture if forced to return to Albania.

The Petitioner submitted, attendant to his motion to reopen, several newly-obtained documents concerning the continuing and escalated threat of violence toward the Petitioner if he is forced to return to Albania. Id. Petitioner presented to the Board a death announcement for his brother, a certificate and report from Bahri Gukaj, MD, the doctor was treated his brother before he died, and a certificate from the Association of Politically Persecuted Persons. This tragic incident shows the worsening state of life for citizens of Albania, despite the superficially-improved international visage of the country following a shift at the highest levels of government. This information would have led any rational trier of fact to make a finding that conditions had worsened, and that the Petitioner's fear was not only valid, but also strongly supported by the newly-obtained documentation.

In this case; however, the BIA decision, upheld by the Second Circuit, rests on the assertion that "the BIA explicitly found two inconsistencies between the

new evidence and evidence already in the record." See Appendix, pg. 4a. This assertion is contradicted, not only by the record of proceedings, but by the BIA decision itself.

The first contradiction is explained in the BIA decision as follows:

> The [Petitioner] testified that no member of his family had ever been a member of a political party. The [Petitioner] presents new evidence which states that in 2007 (and perhaps earlier) his brother worked for the Demochristian Party and LZHK (Movement for National Development. Pet. App. 38A.

The second contradiction is explained in the BIA decision as follows:

> [Petitioner] testified that he visited his brother at his home in Broje, Albania. The [Petitioner's] new evidence states that his brother organized a political meeting in Koplik, Albania and was buried in Koplik. Pet. App. 38A.

The Second Circuit cited these two alleged inconsistencies as the reason for upholding the BIA decision. However, a closer examination of these alleged inconsistencies reveals that the inconsistencies exist only in the absence of explanatory facts which are already in the record.

For example, the first inconsistency vanishes when the record is reviewed. Petitioner testified that no one in his family was involved with any political party during his testimony taken on May 3, 2004. The

document regarding his brother's political activity with the Demochristian Party revolves around political activities which occurred in 2007. Petitioner could not, in 2004, testify as to his brother's political activities in 2007, as they had not yet occurred. Clearly there is no contradiction between these two assertions. To deny Mr. Volaj's motion to reopen based upon this falsely constructed inconsistency is clear error.

The second inconsistency also vanishes when the record is reviewed. On May 3, 2004, Petitioner testified that his brother resided in Broje, Albania. The new evidence states that Petitioner's brother organized meetings in Koplik, Albania. This appears to be an inconsistency until the facts reveal that Broje is a village in the region of Koplik. The BIA, in its decision states, "While it is possible that the [Petitioner's] brother moved from Broje to Koplik after May 3, 2004," they never considered the most obvious explanation, that Broje is a village in Koplik.

This is the sort of error that is likely to occur when the BIA and Second Circuit refuse to evaluate the evidence to see if it shows changed country conditions. Reopening Petitioner's proceedings in this case is proper, where the documents evidence changed country conditions. The issues of the aforementioned nonexistent discrepancies are better left to the administrative tribunal conducting an evidentiary hearing.

In any motion to reopen, issues can be raised, as no set of evidence can conceive of, address, and answer every possible objection imaginable. That is the purpose of a hearing, where issues can be addressed and questions answered.

In this case, where the Second Circuit rubber-stamped the decision of the BIA, where the only reasons for denying the motion cannot stand the slightest scrutiny. This Court should accept this case, and set a clear and unequivocal standard for the evaluation of a motion to reopen immigration proceedings based upon the submission of new and previously unavailable evidence.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHE & ASSOCIATES, P.C.

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Attorneys for Petitioner

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APPENDIX A

08-4473-ag
Agostin v. Holder

BIA
A79 669 224

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08-4473-ag
NAC

[Filed February 1, 2010]

JUBANI AGOSTIN, a.k.a.
ZEF GJON VOLAJ,
Petitioner,

v.

ERIC H. HOLDER, Jr.,
ATTORNEY GENERAL,[1]
Respondent.

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr. is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of February, two thousand ten.

PRESENT:

ROSEMARY S. POOLER,
ROBERT D. SACK,
DEBRA ANN LIVINGSTON,
Circuit Judges.

FOR PETITIONER:

Charles Christophe, New York, New York.

FOR RESPONDENT:

Gregory G. Katsas, Assistant Attorney General, James A. Hunolt, Senior Litigation Counsel, Christopher P. McGreal, Trial Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Petitioner Jubani Agostin, a native and citizen of Albania, seeks review of an August 12, 2008 order of the BIA denying his motions to reopen and reconsider. *In re Jubani Agostin*, No. A79 669 224 (B.I.A. Aug. 12, 2008). We assume the parties' familiarity with the underlying facts and procedural history of the case.

As a preliminary matter, we lack jurisdiction to consider Agostin's argument that the BIA should have reopened his proceedings *sua sponte*. *See* 8 C.F.R. § 1003.2(a); *Azmond Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006). Because Agostin fails to challenge the BIA's denial of his untimely motion to reconsider, we deem any such argument waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005).

We review the BIA's denial of a motion to reopen for abuse of discretion. *See Ali*, 448 F.3d at 517. Here, the BIA properly denied Agostin's motion to reopen as

untimely where it was filed over a year after his 2006 final order of removal. *See* 8 C.F.R. § 1003.2 (c) (2) (providing that an applicant must file a motion to reopen within ninety days of the final administrative decision). Moreover, the BIA did not abuse its discretion in finding that Agostin failed to present material evidence of changed country conditions sufficient to satisfy the exception to the time limitation. *See* 8 U.S.C. § 1229a (c) (7) (C) (ii); 8 C.F.R. § 1003.2 (c) (3) (ii); *INS v. Abudu*, 485 U.S. 94, 104-105 (1988).

Contrary to Agostin's argument that the BIA failed to consider the evidence he submitted, the BIA explicitly found two inconsistencies between that new evidence and the evidence already in the record. Agostin failed to explain these inconsistencies. Particularly where the IJ had already found that Agostin was not credible, a finding we previously affirmed, we find no basis to disturb the agency's denial of Agostin's motion. *See Kaur v. Board of Immigration Appeals*, 413 F.3d 232, 233-34 (2d Cir. 2005); *Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147-48 (2d Cir. 2007).

For the foregoing reasons, the petition for review is DENIED. The pending motion for a stay of removal in this petition is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/Catherine O'Hagan Wolfe
[seal]

APPENDIX B

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Kharash, Alexander
2 Wall St. 8th Floor
New York, NY 10005-0000

U.S. INS/HAR
450 Main St, Room 483
Hartford, CT 06103-3060

Name: AGOSTIN, JUBANI **A79-669-224**

Date of this notice: 10/05/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr

Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
O'Leary, Brian M.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A79 669 224 - Hartford Date: OCT - 5 2006

In re: JUBANI AGOSTIN a.k.a. Zef Gjon Volaj

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Alexander Kharash, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact[1]

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

[1] This charge was withdrawn by the Department of Homeland Security.

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. This case was last before the Board on April 28, 2006, when we remanded the record to the Immigration Judge for completion of the record. The record is complete and the Immigration Judge returned it to the Board for adjudication of the respondent's appeal. The respondent's appeal of the Immigration Judge's May 3, 2004, decision denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2006), is dismissed.

The Immigration Judge's denial of the respondent's application for asylum and withholding of removal under the Act based upon his adverse credibility determination as predicated upon inconsistencies between the respondent's oral testimony, his written sworn statement, and his credible fear interview is supported by the record (I.J. at 8-9 and 10-12). *See Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004) (allowing the use of airport and other statements in an adverse credibility finding where there is sufficient indicia of reliability of the statement). The inconsistencies cited by the Immigration Judge are present in the record and provide specific and cogent reasons upon which to base an adverse credibility determination (I.J. at 10-12). For example, the respondent testified that he fled Albania because he had problems with the mayor of his town (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). According to the

respondent, he was a teacher in his hometown and was asked to keep tabs upon the construction of a new school (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). The construction contract was awarded to a man who was the mayor of his town, and the respondent ultimately came to suspect that he was embezzling funds from the project and openly confronted him on March 26, 1999 (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). During a subsequent meeting in the mayor's office on the same date, the respondent claimed that he was threatened with death (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98).

The respondent further testified that he began exchanging letters with Albanian authorities during the latter half of 1999, but that these letters were ultimately given to the mayor of his town (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). The respondent stated that on May 18, 2001, Albanian police officers came to his home and left word with his wife that he was to report to the police station immediately upon his return (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). The respondent stated that he did not report to the police station and the police officers returned to his home and threatened him and his family (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). According to the respondent's testimony, he and his family fled to the home of his in-laws in Vermosh and on July 7, 2001, an assassin came to the home looking for him (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98). The respondent testified that at the time of this visit he was in Broje with his brother (Tr. at 61-67; 69-75; 77-78; 80-86; 93-98).

In contrast, the respondent indicated in his credible fear interview that the reason he fled Albania was because "of political and economic conditions in my country; I cannot afford to feed my family, I am a

teacher for 30 years and there is no work or freedom" (Exh. 15). The respondent also claimed he had a misunderstanding with the mayor of his town (Exh. 15). The respondent stated that the mayor of his town was a member of the Socialist Party and that as a result he did not vote for him (Exh. 15). According to the respondent, the mayor became upset because he did not receive the respondent's vote and told the respondent that because of this the respondent was now his enemy (Exh. 15). The respondent did not make any mention of the school construction project or the embezzlement accusations nor did he mention the pursuit of "assassins" (Exh. 15). Like the Immigration Judge, we find that these inconsistencies go to the heart of the respondent's claim and undercut his credibility (I.J. at 10-12).

Further, despite the respondent's contentions on appeal, we cannot conclude that the respondent's due process rights were violated by virtue of translation errors. *See* Respondent's Brief at 6-8. While we do not dispute that the interpretation of the respondent's testimony may not have been completely verbatim, the interpreter's errors cited on appeal are not significant. The respondent has also not identified any examples of material testimony which was not translated, or explained how the Immigration Judge relied on incorrectly translated testimony in reaching his decision, or demonstrated how he was prejudiced in these proceedings. *See Matter of G-*, 20 I&N Dec. 764 (BIA 1993); *Matter of K-L-*, 20 I&N Dec. 654 (BIA 1993); *Matter of Santos*, 19 I&N Dec. 105, 107-08 (BIA 1984).

Finally, we find no reason to disturb the Immigration Judge's decision denying the respondent's

application for protection under the Convention Against Torture (I.J. at 17-18). The respondent has failed to sustain his burden of proof in establishing that an individual in his circumstances would "more likely than not" be subjected to treatment rising to the level of torture in Albania as that term is contemplated under the Convention Against Torture (I.J. at 17-18).

Accordingly, the appeal is dismissed.

/s/Brian M. O'Leary
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Hartford, Connecticut

File A 79 669 224

[Dated May 3, 2004]

In the Matter of)
)
JUBANI AGOSTIN,)
aka ZEF GJON VOLAJ,)
Respondent)
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act.

APPLICATION: Asylum and withholding of removal; relief under Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT:

Fatos Kolecki, Esquire
50 Cherry Street,
Suite A

Milford, Connecticut 06460

ON BEHALF OF DHS:

Robert K. Bingham, Esquire
Special Counsel
Department of Homeland
Security
Immigration and Customs
Enforcement
Hartford, Connecticut

ORAL DECISION OF THE
IMMIGRATION JUDGE

The respondent is a 55-year-old, married male, native and citizen of Albania. The respondent was placed into removal proceedings due to the issuance of a September 19th, 2001, Notice to Appear, also known as a Form I-862. See Exhibit 1. Respondent, through counsel, has submitted written pleadings in this case. See Exhibit 2.

The Government; that is, the Department of Homeland Security has withdrawn without prejudice allegations 5 and the first charge of removability; that is, Section 212 (a) (6) (C) (i), that the respondent by fraud or willfully misrepresenting material fact, has procured, or sought to procure admission into the United States. Therefore, the only remaining charge under Section 212 (a) (7) (A) (i) (I) of the Immigration and Nationality Act, that the respondent is an immigrant, who at the time of application for admission, was not in possession of a valid, unexpired, immigrant visa, or other necessary document. The respondent, through counsel, has admitted allegations

1, 2, 3, 4 and 6. As noted, allegation 5 has been withdrawn. The respondent, through counsel, has admitted the one remaining charge, therefore, this Court finds that removability has been established by clear and convincing and unequivocal evidence, and that the Department of Homeland Security has met it's burden.

The respondent has filed an application for asylum and withholding of removal, as well as an application for relief under the Convention Against Torture. This hearing follows.

STATEMENT OF THE FACTS

Respondent testified that his real name is Zef Volaj, and that the name of Jubani Agostin is not his real name, but the name that was contained in the passport with which he attempted to enter the United States.

The respondent testified that he left Albania because of an individual named Rush Draju. The respondent testified that this individual was a well-known politician in Albania. The respondent's affidavit indicates that Mr. Dragu is from a family of a "nationally proclaimed hero of Albania during World War II." The respondent's affidavit at Exhibit 4 and his testimony indicates that he believed that Mr. Dragu was provided numerous opportunities to advance, such as the opportunity to obtain post-secondary education and subsequent employment opportunities and positions with the government.

Essentially, all of the respondent's problems, according to his testimony, surround the fact that he

was charged with overseeing the quality of work to be performed on a new school building in Grabom, Albania, where he was employed as a teacher. The respondent asserts that the contract for the construction of this new building was awarded to Mr. Dragu's construction company. A company that the respondent believed performed "low quality work". The respondent's affidavit indicates that the construction of this building began in the Winter of 1998. The respondent's affidavit indicates that Mr. Dragu was the principal of the school where he taught, as well as being the mayor.

The respondent testified that when the work began on the school, he observed that the mayor's construction company; that is, Mr. Dragu's construction company was not building a new school, but repairing the old existing one. The respondent testified that he complained about this. The respondent testified that he believe that the mayor and his construction company were retaining much of the funds that were set aside for the building of this school, essentially embezzling these funds. The respondent testified that he openly criticized Mr. Dragu in public meetings, and that Mr. Dragu began a "secret battle against him."

Respondent testified that subsequent to this, he was returning from work, and the mayor, while drinking with some of his friends in the center of town, called out to the respondent. The respondent testified that he told the mayor that he should calm down, and that they could speak about this in private. Respondent testifies that he went into the mayor's office, at which point in time, the mayor threatened him with a gun and told him that he needed to sign off

on the project that covered the school that he was overseeing, or it would be the last document he would ever be able to sign, essentially threatening the respondent's life. The respondent testified that he signed this document, and then a whole series of problems began for him.

The respondent testified that he then wrote a letter to the prime minister of Albania, Pandeli Majko, in which he explained what he believed was going on in his town of Kelmand. The respondent testified that this letter was sent by the prime minister's office directly back to Mr. Dragu's office. The respondent testified that Mr. Dragu sent the respondent several threatening letters, and that he, in turn, sent a letter back to Mr. Dragu. The respondent testified that this concluded with Mr. Dragu threatening the respondent personally, telling him to close his mouth, or "we will close it for you." The respondent testified that these series of letters occurred between July of 1999, and December of 1999.

The respondent's sworn statement in Exhibit 4 indicates that in April of 2001, his application for a visa to come to the United States, was refused by the U.S. Embassy in Tirana, Albania. The respondent then testified that on May 18th, 2001, three police officers came to his house looking for him and informed his wife that they had orders to bring him to the police station, and that as soon as he returned home, he must report to the police station in Tamare. The respondent testified that when he returned home, he did not report to the police station.

The respondent testified that next on June 26th, 2001, a person named Gezim Buja, a close friend of the

mayors, came to his house and told him that he had 24 hours to leave his house, otherwise it would be blown up with explosives, killing the respondent and his family. The respondent testified that the following morning, he took he and his family to Vermosh, to stay with his in-laws.

The respondent testified that next on July 7th, 2001, Gjoke Noshi, a driver for Mr. Dragu, came to his in-law's home and requested entry into the house for a drink of water. The respondent testified that he was not there, but that his wife told him that she and the other family members refused Mr. Noshi entry into the house. Mr. Noshi then stated that he needed to come into the house to get a drink of water and to speak with the respondent. The respondent testified that his wife told him that they physically blocked the doorway, notwithstanding the fact that Mr. Noshi had his shirt unbuttoned and was revealing a firearm. The respondent testified that he was at his brother's home at the time, in the town of his birthplace, Broje, in Albania.

The respondent testified that subsequent to that, then he was able to pay a smuggler and leave Albania with fraudulent documents.

STATEMENT OF THE LAW

An applicant for asylum bears the evidentiary burden of proof and persuasion in any application for asylum under Section 208 of the Act. Matter of Acosta, 1999 Dec. 211 (BIA 1985), modified on other grounds, Matter of Molgharrabi, 1999 Dec. 439 (BIA 1987). To establish eligibility for a grant of asylum, an alien must demonstrate that he is a refugee within the

meaning of Section 101 (a) (42) (A) of the Act. See Section 208 of the Act. That section defines refugee as any person who is unable or unwilling to return to his home, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or a political opinion. And applicant for asylum has established a well-founded fear if he presents specific facts establishing that he has actually been the victim of persecution based on one of the five enumerated grounds as cited above or, if he shows that a reasonable person in he circumstance would fear persecution again on the five enumerated grounds, if he were returned to the country of nationality. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

(Indiscernible) with the claim for asylum, is the alien's request for withholding of removal. An alien who seeks this relief from any country, must show that it is more likely than not, that his or her life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or a political opinion. In order to make such a showing, an alien must establish a clear probability of persecution on account of one of the five enumerated grounds. INS v. Stevic, 467 U.S. 407 (1984).

In determining the respondent's claim under the Convention Against Torture, the respondent has the burden of proof in establishing that it is more likely than not that he would be tortured if returned to Albania. See 8C.F.R. Section 1208.16 (c) (2). In analyzing the respondent's claim under the Convention Against Torture, the Court will be guided by the regulations found at 8C.F.R. Section 1208.18(a).

ANALYSIS AND DECISION

This Court does not find the respondent to be a credible witness. Even were this Court to find the respondent to be a credible witness, this Court does not find that the respondent has establish past, persecution or a nexus to any of the five statutory grounds, including that of political opinion. In addition, this Court finds that the respondent cannot establish that he has a well-founded fear of future persecution.

The respondent's testimony is not credible. The respondent testified, for example, that on July 7th, 2001, his wife told him that a man known to all of them named Gjoke Noshi came to look for him at his in-law's house in Vermosh. However, the respondent's affidavit at Exhibit 4 in the record states "luckily, I was hidden in an underground shelter in the house at that particular time." See Exhibit 4, page 3, paragraph 34. In addition, the respondent's affidavit also indicates that Mr. Noshi was a "country-wide known assassin." Id. The respondent makes no mention of Mr. Noshi being a country-wide known assassin in his testimony, but simply describes him as a driver. This testimony goes to the heart of the respondent's asylum application, in that, the respondent is asking this Court to believe that he was being sought after in Albania by assassins, because he accused the mayor of his town of embezzling money. However, the respondent's testimony that on July 7th, 2001, he was not hidden in the underground shelter at his house, but, in fact, was in another town; that is, the town of his birth place in Broje, Albania, with his brother, draws into extremely serious doubt, the respondent's credibility. This is not an incident that the respondent

would easily forget. Either he was hidden in an underground shelter in his in-law's home when an assassin came to kill him, or he was at his brother's house in another town. Both cannot be true. Again, this goes to the heart of the respondent's asylum application and leads this Court to one conclusion, that the respondent is not a credible witness.

In addition, this Court does not find the respondent's testimony to be plausible, particularly in this regard. The respondent would have this Court believe that his family, unarmed, consisting of in-laws, his wife and his children, were able to physically block an armed assassin from entering their home to look for him. This does not ring true in this Court's ears. In addition, this Court notes that the respondent's family, including his in-laws, his wife and his three children, all remain unharmed in Albania. This cuts against the respondent's claim that persecution lurks in his country upon his return. Respondent's testimony is that his wife and children actually live in his home, not the in-law's home, and, again, remain unharmed in Albania.

This Court also considers the respondent's sworn statement and credible fear interview, which are in the record of Exhibit 15. These documents are in the record un-objected to. This Court relies on the reasoning of Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004). The Second Circuit, in Ramsameachire, determined when the Department of Homeland Security, formerly the legacy, INS, may rely on airport statements in judging an asylum applicant's credibility. In this case, this Court finds that the indicia of reliability set forth by the Second Circuit are all present in this case. This Court also notes that the

respondent has not objected to Exhibit 15, his sworn statement, and his credible fear interview.

This Court notes that the factors set forth by the Second Circuit are all present. First, the sworn statement is a verbatim account of the respondent's answers. Second, the questions asked to the respondent due appear to be designed to elicit details of his asylum claim. Specifically, the questioner asked the respondent a number of questions in the sworn statement, including why have you come to the United States, is there anything else that you would like to add to your statement, why did you leave your home country or country of last residence, and do you have any fear or concern about being returned to your home country, as well as, would you be harmed if you returned to your home country, or country of last residence. In addition, it appears that the respondent was not reluctant to reveal information to DHS officials. The interview; that is, the sworn statement did not proceed until the respondent indicated that he understood the officers statements and his rights under the United States law. That also applies to the respondent's interview with the asylum officer. Lastly, nothing in the respondent's answers to the questions posed, suggest that the respondent did not understand English or the translation provided by the interpreter.

In the respondent's sworn statement at Exhibit 15, he is asked why he was coming to the United States. His answer is that he was coming here because of political and economic conditions in his country. He states, "I cannot afford to feed my family, I am teacher for 30 years, and there is no work or freedom. Little kids on the streets have guns, and you never know who could take your life. And that is why I came here,

seeking political asylum." He is asked later, is there anything else you would like to add to your statement. The respondent answers, I am sorry for coming with improper documents, but the situation in Albania is so bad. I borrowed the money for the passport and was supposed to have made payment within 24 hours of arriving in Boston. I am not sure what will happen to me, or my family now, but I fear my life if I go back to Albania now. The respondent is asked, why did you leave your home country, or country of last residence, the respondent answers again, as I said before, I came because of political and economic unrest.

This Court notes that nowhere in the respondent's sworn statement, does he mention that he is afraid of any specific person in Albania. He does not mention Mr. Dragu, or even his title, that he is afraid of the mayor of his town. He simply states generically, that he came to the United States because of political and economic conditions and cannot afford to feed his family, and that there is no work or freedom. This is a far cry from the respondent's testimony before the Court today, as well as his testimony before the asylum officer in his credible fear interview several weeks later.

In the respondent's credible fear interview, he states that he was threatened by the government. He states, "I had misunderstandings with the mayor of the town of Klamen, Rush Dardu." The respondent states that the "official belongs to the Socialist Party, but I did not belong to any party. We did not vote for the official, and he got upset, and he told me, because we did not vote for him, he consider me his enemy." (Sic.) This Court notes that the respondent did not testify before this Court today that Mr. Dragu was

upset, because he did not vote for him. In fact, the respondent's testimony in front of this Court today was that for all intents and purposes, he was a member of the Democratic Party. Although, he testified that he was never formally a member, he testified that he did everything, but formally become a member of the Democratic Party. This Court notes that the respondent made no such mention of that fact in his credible fear interview. In addition, the respondent, in his credible fear interview, mentions that he was forced to sign a document for the school where he worked. However, the respondent does not mention that he was threatened with a firearm, as he mentioned later in his written asylum application and in his testimony. This Court finds that all of that cuts against the respondent's claim and his credibility. This Court finds that it all goes to the heart of the respondent's asylum application.

In fact, this Court notes and finds that the respondent's entire testimony is implausible and lacks any indicia of credibility. The respondent testified that although the mayor and his would-be assassins were so interested in the respondent, they were never actually able to find him. The respondent testified that he was never detained or harmed in any manner. Yet, the respondent's testimony is that assassins were actively hunting him in Albania. This Court does not find the respondent's story to be plausible or credible. His family remains unharmed in Albania. Although, according to his affidavit, an assassin was actually in the presence of his family and in-laws, they were never actually threatened or harmed in any way by this assassin to try to find the respondent. What this Court finds is much more likely in this case, is the respondent wanted to immigrate to the United States.

The respondent, by his own affidavit, was turned down for a visa to enter the United States. And the respondent has simply either completely invented this story, or he has embellished on some fact that existed at the time in order to create his asylum application. What this Court does have, is that the respondent was denied a visa to come to the United States in April of 2001, and then pays a smuggler to come to the United States some four months later in August of 2001. This Court finds that the truth more likely lies in the respondent's desire to leave Albania and come to the United States like so many other country members from Albania.

The United States Government recognizes that at least 700,000 Albanians, compared to the roughly 3.1 million Albanians who live in Albania, reside abroad. See Exhibit 14. The United States Government recognizes that since 1990, immigration from Albania has been by far the highest of any European post-communist country. Poverty in Albania is a serious problem, with Albania generally being rated the second poorest country in Europe after Moldova. And in 1998 survey, published by the European Bank for Reconstruction and Development, 63 percent of respondents from Albania, reported that they probable or definitely would emigrate. Exhibit 14 also notes that Albania continues to experience high levels of violent crime.

Although the respondent's counsel objects to Exhibit 14, the profile of asylum claims and country conditions in Albania, this Court finds that it will give weight to the U.S. Department of State report that indicates that available evidence suggests that neither the Government not the major political parties engage

in policies of abuse or coercion against their political opponents. "Though serious political repression existed in the past, there are no indications of systemic political persecution in Albania at the present time." The respondent points to the other background material in this record and argues that this Court should not give the profile of asylum claim and country conditions set forth by the Department of State in March of 2004, any significant weight. This Court notes that the country reports on human rights practices at Exhibit 13, certainly paint a picture of a poor, human rights record in Albania. However, this Court fails to find information in the country reports at Exhibit 13 that directly contradict the profile of asylum claims at Exhibit 14. On page 4 of 15, the Department of State sets forth that, "there are no confirmed cases of detainees being held strictly for political reasons." As in the profile of asylum claims and country conditions, it appears that the country reports at Exhibit 13 also set forth the fact that although the Democratic Party in Albania alleges serious instances of misconduct by the Socialist Party, none of these cases have ever been confirmed, either by Albanian authorities or by independent human rights organizations. The most notorious of the events claimed by the Democratic Party, was the September 12th, 1998, murder of Democratic Party leader Azem Hajdary. The Department of State, at Exhibit 14, notes that although three individuals were eventually tried and convicted for his murder, Democratic Party activists continue to argue that the Socialist Party played a role in the crime. Again, though, this Court points to the fact that none of these cases, including the murder of Azem Hajdary, have ever been confirmed by either Albanian authorities or by independent, human rights organizations, to have

been committed by the Socialist Party. There are certainly incidents of violence between the two parties as are noted in the reports; however, as stated above, even if this Court were to find the respondent's assertions to be true, that he had a problem of some sort with the mayor in his town, this Court does not find that the respondent can establish either past persecution or a well-founded fear of future persecution.

The acts that the respondent alleges, do not rise to the level of persecution, and more importantly, the respondent cannot show a nexus from these harms to any of the five statutory grounds, including political opinion. Respondent's counsel has withdrawn his assertion that persecution would be on account of membership in a particular social group. The respondent here essentially is asserting that the mayor in his town, Mr. Dragu, was a criminal. The Mr. Dragu was embezzling funds that were intended for schools and hospitals and the like. The respondent testified that he essentially publicly alleged that Mr. Dragu was embezzling these funds. It is not until the respondent's testimony here today, does he raise in any detail the fact that he was deemed a Democratic Party member, although he had not actually formerly joined.

All of the respondent's testimony and written applications set out essentially that he opposed Mr. Dragu, because he believed him to be a criminal, then Mr. Dragu sought a campaign of retribution against him. This Court does not find, even if that were true, that the respondent could establish a nexus from that harm to political opinion. This Court does not find credible, the respondent's eleventh hour assertions

that he is a de facto Democratic Party member. In fact, the respondent appears to be mixing the words Democratic Party with democracy. The respondent seems to be asserting, in a very sophomoric way, that, because he was against a mayor who was embezzling funds, he is somehow a democrat, or a member of the Democratic Party in Albania. This does not follow. This Court does not find the respondent's assertions, in that regard, credible.

This Court is also concerned that the respondent has not provided corroborative evidence in this case. The respondent has submitted letters, which are unsworn, and the makers are not available, relating to the new mayor of Kelmand, apparently, the man who replaced Mr. Dragu, and, allegedly, the president of the Democratic Party. This Court does not give those unsworn documents significant weight. This Court does, certainly, note that in the respondent's asylum application at Group Exhibit 3, he does have an affidavit from his wife; however, this Court notes that, that document is very vague, and, in fact, states that she "cannot provide the names of threatening parties, because that would threaten her life further and make it worse for her children." This Court does not find that helpful to this Court and certainly does not find it particularly supportive of the respondent's application for asylum.

What this Court does find significant in this case, is that the respondent, although, he was made aware of the procedures for authenticating documents, has never actually tried to follow those procedures in this case. This Court certainly recognizes that authentication means the document is "real," not that its contents are necessarily "true". In this case,

however, the respondent has not taken any steps to demonstrate to this Court that he is who he says he is. Although, the respondent has produced a second passport now, separate from the passport he used to enter the United States, the respondent has not authenticated that document, nor has he proved in any way that the contents of that passport are true. In addition, although the respondent states that he has letters from Mr. Dragu and his response to Mr. Dragu and his letter to the prime minister, as well, the respondent has not provided those to this Court. Although, the respondent testified that he has those with him, he provided no explanation as to why those were not offered and did not have translations with him today.

In addition, this Court is troubled by the fact that, although the respondent's family remains in Albania, as stated above, they are unharmed. In addition, the respondent, although his family remains in Albania, claims to have no information about Mr. Dragu's whereabouts, other than, he believes that he is still a strong member of the Socialist Party. Again, this Court finds that the respondent's testimony surrounding the Democratic Party and the Socialist Party and the tension that caused him trouble, is essentially testimony that he has at the eleventh hour created for this Court, because he believes it will strengthen his asylum application. This Court is unconvinced. This Court does not find that the respondent can show either past persecution or a nexus to any of the five statutory grounds, and this Court will deny the respondent's asylum application on the basis of past persecution.

WELL-FOUNDED FEAR OF FUTURE PERSECUTION

The entire discussion on past persecution and credibility must be incorporated by reference herein. This Court cannot find that the respondent has a well-founded fear that he will be persecuted if returned to Albania. As in all asylum claims, the burden is on the respondent to prove that he has a well-founded fear of persecution upon return to Albania on one of the five statutory grounds. In this case, this Court finds that the respondent has not established that there is a reasonable possibility that he may suffer persecution in his country; that is Albania, on the basis of race, religion, nationality, membership in a particular social group or political opinion. This Court finds that there is no reasonable possibility that the respondent would suffer such persecution. Again, the Court does not find the respondent to be credible, and even were this Court to find the respondent to be credible, this Court notes that the mayor, Mr. Dragu, is no longer in power. The respondent's testimony that Mr. Dragu remains some sort of a force in the Socialist Party is mere conjecture, and this Court again points to all of its reasoning above in denying the respondent's application for asylum, on the basis of well-founded fear of future persecution.

WITHHOLDING OF REMOVAL

The entire discussion on past persecution must be incorporated by reference herein. The standard for withholding of removal is higher than for political asylum. In this case, since the respondent could not reach the lower burden for political asylum, he should not be able to reach the higher burden for withholding

of removal. By incorporating by reference, the whole discussion on past persecution in this section, it is clear that the respondent has failed to establish, by a preponderance of the evidence, that he would be persecuted upon his return to Albania.

RELIEF UNDER ARTICLE 3 OF THE CONVENTION AGAINST TORTURE

The respondent has also applied for relief under the United Nations Convention Against Torture. This Court notes that the burden of proof is on the respondent to establish that it is more likely than not that he would be tortured if removed to Albania. This Court notes that, although this Court has made an adverse credibility determination in the asylum context, this should not necessarily affect this Court's consideration of the respondent's Convention Against Torture claim. In terms of the respondent's claim under the Convention Against Torture, he need only proffer objective evidence that he is likely to be tortured in the future if returned to Albania. However, even setting aside this Court's credibility concerns regarding the respondent, the respondent has not proffered any objective evidence that he is likely to be tortured if returned to Albania. Again, this Court notes that the respondent remained completely unharmed in Albania, while he was there, although the mayor, whom he feared, remained in power and purportedly had control of police forces and "assassins" as the respondent claims. Yet, both the respondent and his family remained unharmed in Albania. There is no objective evidence in this record to indicate that the respondent would be tortured upon his return to Albania, by either the government or someone acting on the government's behalf or with their acquiescence,

or that some entity that the government simply would ignore in torturing the respondent. In this case, the respondent's claim is that either the mayor, Mr. Dragu, or someone acting on his behalf, would seek to harm the respondent. This Court does not find that the respondent can meet is burden of proof in this regard and will deny the respondent's application for relief under the Convention Against Torture.

The respondent has not applied for and is not eligible for any other form of relief in these proceedings.

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum be and is hereby denied;

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be and is hereby denied;

IT IS FURTHER ORDERED that the respondent's application for relief under the Convention Against Torture be and is hereby denied;

IT IS FURTHER ORDERED that the respondent be removed from the United States to Albania, based upon the charge contained in the Notice to Appear at Exhibit 1.

MATTHEW J. D'ANGELO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before MATTHEW J. D'ANGELO in the matter of:

JUBANI AGOSTIN

A 79 669 224

Hartford, Connecticut

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

_____

Anne Donovan (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

May 27, 2005
(Completion Date)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Number: 08-4473-ag

[Filed March 31, 2010]

Agostin	)
	)
v.	)
	)
Holder	)
	)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of March, two thousand and ten.

BEFORE: **ROSEMARY S. POOLER,**
ROBERT D. SACK,
DEBRA ANN LIVINGSTON,

Circuit Judges.

ORDER

Petitioner Jubani Agostin having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/Catherine O'Hagan Wolfe, Clerk

Jeanine Cook, Deputy Clerk

APPENDIX E

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Foster, Linda
56-07 184th Street
Fresh Meadows, NY 11365

U.S. INS/HAR
450 Main St, Room 483
Hartford, CT 06103-3060

Name: AGOSTIN, JUBANI **A079-669-224**

Date of this notice: 8/12/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A079 669 224 - Hartford Date: AUG 12 2008

In re: JUBANI AGOSTIN a.k.a. Zef Gjon Volaj

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Linda Foster, Esquire

APPLICATION: Reopening; reconsideration

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen and reconsider our decision dated October 5, 2006. We dismissed the respondent's appeal from the Immigration Judge's decision which found him removable and denied his applications for asylum, withholding of removal, and protection under the United Nations Convention Against Torture (CAT). The motion will be denied. The motion to reconsider will be denied as untimely.

The respondent's motion to reopen is untimely. The respondent submits new evidence, apparently to satisfy the changed circumstances exception at

8 C.F.R. § 1003.2(c)(3)(ii).[1] We find that the changed circumstances (the death of the respondent's brother, allegedly by poisoning) are not material to his asylum and withholding claims.

The Immigration Judge made an adverse credibility finding (I.J. at 8-17). The Board agreed with the Immigration Judge's adverse credibility finding (BIA at 1-2). The respondent does not explain two inconsistencies between evidence of record and the new evidence he submits in support of his motion to reopen. The respondent stated in his asylum application that no family members had ever belonged to or been associated with any organizations or groups in Albania, such as but not limited to, a political party or human rights group (Exh. 3, Page 5, Question 2). The respondent testified that no member of his family had ever been a member of a political party (Tr. at 72). The respondent presents new evidence which states that in 2007 (and perhaps earlier) his brother worked for the Demochristian Party and LZHK (Movement for National Development) (Motion Exh. D). While it is possible that the respondent's brother started such activities after March 3, 2004 (the hearing date), no explanation is offered by the respondent for this inconsistency.

Further, the respondent testified that he visited his brother at his home in Broje, Albania (Tr. at 97-98). The respondent's new evidence states that his brother organized a political meeting in Koplik, Albania, and was buried in Koplik (Motion Exhs. A, D). The medical

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[1] To the extent the motion seeks protection under CAT, we will consider such application as included within the exception.

evidence the respondent submits shows that his brother resided in Koplik (Motion Exh. C). While it is possible that the respondent's brother moved from Broje to Koplik after May 3, 2004, no explanation is offered by the respondent for this inconsistency.

We find that the respondent does not show that the changed circumstances are material to his claim for protection under CAT. The respondent's motion to reopen for protection under CAT is based on the same new evidence as his motion to reopen for asylum and withholding.

Accordingly, the motion is denied.

/s/ Frederick D. Hess
FOR THE BOARD